No. 9133

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

JAMES H. JORDAN, J. R. MASON, L. F. ABADIE, GEORGE F. COVELL, and FIRST NATIONAL BANK OF TUSTIN (a corporation),

Appellants,

vs.

PALO VERDE IRRIGATION DISTRICT (an irrigation district),

Appellee.

APPELLANTS' PETITION FOR A REHEARING.

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Subject Index

Table of Authorities Cited

Cases

Codes and Statutes

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To the United States Circuit Court of Appeals for the Ninth Circuit, the Honorable William Denman, Clifton Mathews, and Albert Lee Stephens, Judges, Presiding:

Come now, James H. Jordan, J. R. Mason, L. F. Abadie, George F. Covell, and First National Bank of Tustin, a corporation, Appellants herein, and respectfully petition this Honorable Court for a rehearing in the above entitled cause, and for grounds of said petition, show:

I.

ALL PROPOSITIONS ARGUED BY APPELLANTS WERE PRESENTED TO THE TRIAL COURT.

This Court states at page 3 of its opinion that Propositions 4, 6, 7, 8, 9, 10, 11, 12, and 13 were not urged in the trial Court. This whole case has been tried twice before. The first trial had been before Judge Cosgrave and lengthy arguments had been made to that Judge and voluminous briefs were filed, so that when the second trial under the new bankruptcy act came up counsel considered that Judge Cosgrave was sufficiently familiar with the record and the arguments of counsel, so that Appellants did not wish to unduly encroach upon the patience of the Court and orally presented but the three points, whereupon Judge Cosgrave stated that he did not desire to hear arguments upon other points. The objections, however, appear in the record as we will now proceed to show.

Proposition 4 was presented by the answer (R. 60-62). Proposition 6 is presented by the answer (R. 63). As to Proposition 7, the answer twice denies that the plan of composition is fair or equitable or for the best interests of creditors, and alleges discrimination in favor of the R.F.C. (R. 61, 64). Proposition No. 11 was brought to the Court's attention by the separate defenses in the answer (R. 66). As to Proposition 13 it is specifically alleged in the answer (R. 67) that the State of California cannot consent and that its consent is unconstitutional (and it may be pointed out not only

for the violation of the contract clause, but the violation of Article IV, Section 1, Article X, Section 5, and Article XIII, Section 6 of the State Constitution, and as to these objections this Court nowhere comments in any of its opinions).

Proposition 9 is specifically raised as a defense in the answer at R. 67. Proposition 10, as to taking of trust funds, was pleaded indirectly through pleading violation of the Fifth Amendment to the United States Constitution and that the plan was inequitable. Furthermore it was pointed out that the statute itself requires the trial Court to make certain definite findings and it would not seem that it would be incumbent upon a creditor in a bankruptcy proceeding to make any pleading or representation with respect to such obligatory findings such as that the plan is fair or that the district is not authorized by law to carry it out. The material allegations of the petition with respect to these requisite findings are denied by the Appellants in their answer. Furthermore the case was tried upon the entire theory of these objections, including the question of whether the district was authorized by law to carry out the plan. This objection related not to the question of state consent, but the question of statutory authority of the district to perfect the plan.

II.

JURISDICTION.

Appellants urge that the Court was without jurisdiction to entertain the petition and in that behalf rely upon the arguments of Appellants in the Merced case in their petition for rehearing heretofore filed.

III.

RES JUDICATA.

Appellants refer to the argument of the Appellants in the Lindsay-Strathmore Irrigation District and Merced Irrigation District cases in the petitions for rehearing and reply upon the arguments there presented, but further call attention to the particular circumstances of the instant case. It will be recalled that Appellants pleaded at R. 65 that the judgment became final, that is the judgment of the District Court under Section 80, and that by force and effect thereof all of the matters set forth in the present petition are *res judicata.* Under the authority of the important and controlling case of *Chicot County Drainage District v. Baxter State Bank,* 308 U.S. 371, 60 S. Ct. 317 and the case of *Stoll v. Gottlieb,* 305 U.S. 165, it must be considered that the Court had jurisdiction to enter its judgment and thereby to determine all possible issues. Among these issues is the issue of unconstitutionality. This is specifically set forth in the record at R. 298. At this same page in the record it is shown that the first bankruptcy case came on for

trial and was heard by the Court and tried on the merits, and on December 8, 1936, Judge Cosgrave entered a judgment of dismissal. This Court's statement at page 9 of the Merced decision that "no reasons are given" for the decision, or that the decision is not *res judicata* of any rule of law, simply does not apply in this case. The Merced opinion is not in point. The judgment of dismissal was specifically made on the grounds of unconstitutionality, and under the authority of the cases we have cited it is also *res judicata* of the merits of the plan.

IV.

THE EFFECT OF THE PRIOR CONSENT.

As this Court has noted at page two of its opinion, argument was addressed to the District Court on the proposition of the plan having been carried out out of Court. Now the R.F.C. (R. 150, 328) filed a written consent to the plan of composition which was filed under the State Court proceedings under the provisions of Cal. Stats. 1927, Chapter 24. This Court nowhere in its opinion comments upon the effect of Section 19 of that statute, which provides that if the petition is dismissed the dismissal "shall not affect the effectiveness of the plan with respect to the district or holders of bonds or warrants, accepting the same". It is our contention which has not been met by this Court that this acceptance constituted a contract under that statute of the State of California and that

the R.F.C. is consequently bound thereby as a matter of law and that its consent therefore cannot be counted in this case, and that the plan has therefore already been carried into effect so far as the bonds held by the R.F.C. are concerned.

V.

THE DISTRICT IS NOT AUTHORIZED BY LAW TO CARRY OUT THE PLAN.

Chapter IX of the Bankruptcy Act requires the trial Court to make a finding on this question. In the Bekins case the Supreme Court said that this requirement refers to local law. The Court has not commented upon the following points:

1. The authority of the R.F.C. to loan expired in 1936. Title 15, Sec. 504(a) U.S.C. provides that no funds shall be disbursed on any commitment to make a loan made by the R.F.C. "after the expiration of one year from the date of such commitment or agreement".

2. There was no approval of the Districts Securities Commission of the plan adopted May 10, 1938.

3. The plan of composition of May 10, 1938, is not shown to be authorized by the Board of Trustees of the district (R. 12, 21).

VI.

THE R.F.C. QUESTION.

Reference is made to the arguments of the Appellants in the Merced Irrigation District case and in the Lindsay-Strathmore Irrigation District case which arguments are set forth in the petitions for rehearing in those cases and are hereby adopted and referred to.

VII.

TRUST PROPERTY.

The Court erred in holding that Section 29 of the California Irrigation District Act does not create a trust of which bondholders are beneficiaries.

The citation of the case of *Clough v. Compton-Delevan Irrigation District,* 96 C. D. 509, 86 Pac. (2d) 126, 128, was perhaps unfortunate because the Court was there discussing primarily whether or not the bondholders' payment of money to the district created a resulting trust and the Supreme Court correctly held it did not.

However, in *McKaig v. Moutrey,* 90 Pac. (2d) 108, 32 Cal. App. (2d) 537, decided by the Third District Court of Appeal several months after the *Compton-Delevan* case that Court said:

> "The assessments levied created liens on the land and a trust in favor of the bondholders.",

and in the case of *Provident Land Corporation v. Zumwalt,* 94 Pac. (2d) 83, 99 C. A. D. 1, decided with

the *Compton-Delevan* case, the Court seems to Appellants definitely to hold that there is a trust in favor of the bondholders. The Court says:

> "In our opinion, the statute was intended to secure the bonds by the proceeds of the land in the district. It is true that the bonds themselves are not a lien on the land. But the assessment is a lien (Sec. 40), * * *"

The Court also says, discussing Section 29:

> "* * * the lands remain in trust, and the district exercises its powers, however broad, as a trustee.",

going on to hold that the proceeds follow the trust, and then discussing whether or not "payment of the bondholders is one of these purposes", that is one of the purposes of the trust, says:

> "Among other purposes of the act, therefore, is the repayment of the bondholders of the district, and it follows that this is one of the purposes for which the trust money is held * * * The land is the ultimate and only source of payment of the bonds. It can never be permanently released from the obligation of the bonds until they are paid."

Appellants suggest that the analysis of the trust relation in the Merced case is erroneous.

VIII.

50 CENTS PAID SOME, 23.248 CENTS OTHERS.

Appellants point out an error in the Court's statement where the Court says that the plan provided 24.81 cents for all the bondholders. It is true that the plan set forth at R. 21 appears so to provide. But the bondholders did not receive 24.81 cents. As Appellants pointed out in their opening brief at page 93, the record bears this statement out quite amply at R. 223. L. R. Hauser, vice-president of the district testified that it was arranged that the Mutual Water Company bondholders should receive 50 cents on the dollar for their bonds and that the holders of the bonds of the other three districts should give up the difference so that they should actually receive not 24.81 cents, but 23.248 cents per dollar. And see R. 181 where this is further explained. The R.F.C. refused to make that modification, but nevertheless it was carried out. See also R. 242 and R. 337 where some of the Appellants requested a modification of the plan to allow them the same 50 cents that had been paid to the Mutual Water Company bondholders. This discrimination is contra to the plan and unjust.

IX.

FAIRNESS OF THE PLAN.

The plan as judged by the *Los Angeles Lumber Products* case is grossly unfair.

1. The district, since it entered into the arrangements with the R.F.C., has been able to build up what amounts to a surplus cash fund of over $100,000.00.

The assessed value of the land itself was $5,000,000.00 in 1927 and approximately $3,000,000.00 in 1937 (R. 258).

The R.F.C. appraiser appraised the value at $70.00 to $80.00 an acre (R. 295). This relates to 30,000 acres of land which alone would be therefore valued at $2,250,000.00.

It is quite clear that inasmuch as a loan by the R.F.C. was obviously a bankers loan, and undoubtedly based upon not over 50% of the value of the probable assets, and as under the provisions of California law relating to issuance of bond, bonds cannot exceed 60% of the value of the bare lands, water rights, canals and other properties of the district, someone gets the beneficial interest.

Inasmuch as 99.66% of the land was owned by the district it seems to Appellants to be a great injustice that this beneficial interest should be taken from them and given to others. It certainly does not seem that it was intended by this procedure to take the property and assets of the bondholders and to give a portion thereof to individuals who are not even interested parties in the bankrupt concern. If the plan of com-

position had provided that the bondholders would get the money from the R.F.C. and all the lands in addition the plan would have been fair, but it cannot be fair if tested by the *Los Angeles Lumber Products* case when one dollar of value is given to any prospective or past landowner.

Mr. Williams (R. 187) said that after refinancing the district proposes to sell the land back to the former owners. This has been done. In the case of *Kaufman County Improvement District No. 4, Bankrupt,* ..... Fed. Sup. ....., decided July 22, 1940, where the District Court in Texas (Judge W. A. Atwell) dismissed the plan of composition under this act as unfair and discriminatory, the Court said:

> "It does discriminate. That is the purpose of it. That is the reason they went this route. There is little use to talk about that. It is apparent on its face; they thought if they did nothing and paid nothing and let it go to weeds and grass, then they could buy it in and do what they pleased with it, and I am not going to approve it."

And referring to the payment of taxes the Court said that while there may have been some assessments from 1930 to 1940, the assessments have not been paid and the judge finds that the "discontinuance has been practically unanimous" and that "there was a concert of action in that direction". He also finds that the land in its present condition is of practically no value. This decision has not yet been reported but will shortly be reported in Federal Supplement, but at any rate that is about the situation in the *Palo Verde* case.

Judge McCormick remarked in one of his decisions, that the benefits and increased values to the district have resulted in quite a degree from the R.F.C. refinancing. It is the Appellants' contention that whatever that benefit is it should redound to the benefit of the creditors and not to the benefit of the beneficial or equitable owners of the assets.

We cite the case of *Burough of Fort Lee v. U. S.,* 104 Fed. (2d) 275, as authority for the proposition that the issuance of the writ of mandate constitutes a vested right. We refer to the writ of mandate which the Court says was merely an ex parte order and which impounded approximately $100,000.00 of district funds for the Appellants (R. 304).

Lastly, on fairness, there is the matter of interest paid the R.F.C.

In conclusion we respectfully refer to the arguments presented in the other petitions for rehearing in the companion cases, involving the Corcoran, Merced, Lindsay-Strathmore, and James Irrigation District cases. We also refer to the points and arguments made in our opening and closing briefs and upon oral argument, and we respectfully urge that a rehearing be granted and the decree reversed.

It is respectfully suggested to this Court that in the event a rehearing is denied in the Merced case that inasmuch as the appellants in that case, or the majority of them, intend to apply to the United States

Supreme Court for a writ of certiorari in that case, that denial of the petition for rehearing herein might appropriately be withheld until final action has been taken in the Merced case. We do not suggest, however, that an order granting a rehearing should be withheld.

Dated, Turlock, California,
October 4, 1940.

Respectfully submitted,
W. COBURN COOK,
CHAS. L. CHILDERS,
Attorneys for Appellants and Petitioners.

CERTIFICATE OF COUNSEL.

We hereby certify that we are counsel for the appellants and petitioners in the above entitled cause and that in our judgment the foregoing petition for a rehearing is well founded in point of law as well as in fact and that said petition for a rehearing is not interposed for delay.

Dated, Turlock, California,
October 4, 1940.

W. COBURN COOK,
CHAS. L. CHILDERS,
Counsel for Appellants and Petitioners.